

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-1345

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PPS

To be argued by
STEVEN K. FRANKEL

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-1345

UNITED STATES OF AMERICA,

Appellee,

—v.—

RALPH JACOBSON,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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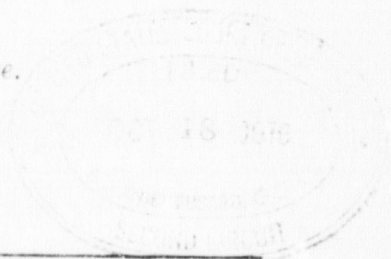


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
A. Government's Case	2
B. The Defense Case	5
POINT I—The prosecution of this case was proper, and not violative of Jacobson's constitutional rights	6
POINT II—The District Court's charge was legally correct and did not prejudice Jacobson	10
CONCLUSION	14

TABLE OF CASES

<i>Edwards v. United States</i> , 375 F.2d 759 (9th Cir. 1955)	12
<i>Glasser v. United States</i> , 315 U.S. 60 (1942)	13
<i>Jaben v. United States</i> , 349 F.2d 913 (8th Cir. 1965)	12
<i>Siravo v. United States</i> , 377 F.2d 469 (1st Cir. 1967)	12
<i>United States v. Alessi</i> , 536 F.2d 978 (2d Cir. 1976)	7, 8
<i>United States v. Beasley</i> , 519 F.2d 233 (5th Cir. 1975)	12
<i>United States v. Cala</i> , 521 F.2d 605 (2d Cir. 1975)	7
<i>United States v. Campisi</i> , 248 F.2d 102 (2d Cir.), <i>Cert. denied</i> , 355 U.S. 892 (1957)	8
<i>United States v. Dawson</i> , 400 F.2d 194 (2d Cir. 1968), <i>cert. denied</i> , 393 U.S. 1023 (1969) ...	7
<i>United States v. DiVarco</i> , 484 F.2d 670 (7th Cir. 1973), <i>cert. denied</i> , 415 U.S. 916 (1974) ..	12, 13

	PAGE
<i>United States v. Edwards</i> , 366 F.2d 853 (2d Cir. 1966), <i>cert. denied sub nom. Jakob v. United States</i> , 386 U.S. 908 (1967)	8
<i>United States v. Gugliaro</i> , 501 F.2d 68 (2d Cir. 1974)	8
<i>United States v. Jacobson</i> , 404 F. Supp. 1238 (S.D.N.Y. 1975)	8
<i>United States v. Kramer</i> , 289 F.2d 909 (2d Cir. 1961)	8
<i>United States v. McCall</i> , 489 F.2d 359 (2d Cir. 1973), <i>cert. denied</i> , 393 U.S. 1023 (1969)	7
<i>United States v. Pacelli</i> , 470 F.2d 67 (2d Cir. 1972), <i>cert. denied</i> , 410 U.S. 983 (1973)	7
<i>United States v. Papa</i> , 533 F.2d 815 (2d Cir. 1976)	7
<i>United States v. Robinson</i> , Dkt. No. 75-1197 (2d Cir., April 8, 1976) slip op. 3119	9
<i>United States v. Schipani</i> , 293 F. Supp. 156 (E.D.N.Y. 1968), <i>aff'd</i> , 414 F.2d 1262 (2d Cir. 1969), <i>cert. denied</i> , 397 U.S. 922 (1970)	7
<i>United States v. Seijo</i> , 537 F.2d 694 (2d Cir. 1976)	8

STATUTES

26 U.S.C. § 7201	12
26 U.S.C. § 7206(1)	2, 13

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—v.—

RALPH JACOBSON,

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Ralph Jacobson appeals from a judgment of conviction entered on July 23, 1976, in the United States District Court for the Southern District of New York, after a five day trial before the Honorable Morris E. Lasker United States District Judge, and a jury.

Indictment 75 Cr. 349, filed in two counts on April 9, 1975, charged Jacobson with filing false and fraudulent federal income tax returns for the calendar years 1968 and 1969, respectively, in violation of Title 26, United States Code, Section 7206(1).

Trial commenced on June 10, 1976, and concluded on June 14, 1976, when the jury found Jacobson guilty on Count One, and not guilty on Count Two.

On July 23, 1976, Judge Lasker sentenced Jacobson to a term of three years imprisonment on Count One.

Jacobson is presently free on a personal recognizance bond pending the determination of this appeal.

Statement of Facts

A. Government's Case

The proof at trial established that in the early part of 1968, Ralph Jacobson loaned Theresa Lissauer a total of \$2,800, and thereafter collected interest payments from Lissauer of between \$150 and \$200 per week through March, 1969. These payments were not reported on Jacobson's federal income tax returns for the years 1968 and 1969.

During 1968 and 1969, Theresa Lissauer was the owner of a women's dress shop located on Queens Boulevard, in the borough of Queens (Tr. 137). With both Lissauer and the store in financial difficulty in January 1968, Trudy Tannenbaum, a saleswoman in the store, introduced Mrs. Lissauer to the defendant, so that Lissauer could borrow a sum of money that would permit her to retain the business (Tr. 142). Jacobson came to the store sometime in January 1968, examined the books and merchandise, and loaned \$1,500 in cash to Lissauer (Tr. 143-44). When Lissauer was unable to repay Jacobson within a week as she had promised, Jacobson told her that she could give him \$150 per week, and the first such payment was made one week after the loan. (Tr. 145-46). After making one payment per week for approximately eight or nine weeks, and thus nearing the repayment of the \$1,500, Lissauer inquired of the defendant as to how much the interest would be. Jacobson responded by physically shaking Lissauer, and angrily replied that she had not even begun to pay the principal and that she had only been paying the "vig" (Tr. 147-48). At no time, thereafter, did Jacobson indicate that Lissauer's payments were other than interest or "vig".

Lissauer continued making payments to Jacobson through March of 1968, at which time two tax collectors from the Internal Revenue Service came to the store intending to close the business for non-payment of back sales taxes (Tr. 170). Lissauer contacted Jacobson and borrowed an additional \$1,300, in cash, with which she paid the collectors (Tr. 171). Jacobson returned later during that day and asked Lissauer to raise her interest payments to \$200 per week (Tr. 173). She continued to make interest payments to the defendant through the summer of 1968, at which time Jacobson took, as "collateral", Lissauer's mink coat, valued at \$3,000 (Tr. 185-86). Weekly interest payments continued through March 1969, just prior to the time that Lissauer filed for bankruptcy and closed the store (Tr. 188). Lissauer testified that during the period January 1968 through March 1969, she never missed a weekly interest payment of at least \$150 to Jacobson (Tr. 187).

Michael Bienes, a certified public accountant, prepared Ralph Jacobson's joint federal income tax return for the year 1968 (Tr. 45). Bienes recalled that Jacobson provided a Form W-2 and a Form 1099 in response to Bienes' requests for forms from the defendant. Jacobson also indicated that he had earned \$3,440 of miscellaneous income but did not explain the source or substance of the income (Tr. 489).

George Curtis, a public accountant, testified regarding his preparation of Jacobson's federal income tax return for the year 1969 (Tr. 67-135).*

Various other witnesses—Nathan Goldstein (Tr. 394 et seq.), Joseph Hay (Tr. 418 et seq.), Constantinos Papadopoulos (Tr. 440 et seq.), and Lilian Karika (Tr.

* Curtis' testimony related only to the return prepared for the year 1969 (Count Two) on which the defendant was found not guilty.

470 et seq.)—also testified for the Government concerning various “similar acts” performed by Jacobson. In details not necessary to relate here since Jacobson does not contest the sufficiency of the evidence against him, they testified about other occasions where Jacobson had lent them money in return for high interest payments.

Kevin Connolly, who was a Revenue Officer with the Internal Revenue Service in 1968, testified that on April 12 or 13, 1968, he and his partner (Mr. Lapidus) collected \$1,300 in back taxes owed by Lissauer to the Government. After delaying the closing and padlocking of Lissauer’s store for three hours, Lissauer left, then returned, followed by two men, one man being over six feet in height (the defendant is more than six feet tall) (Tr. 410-511). The two men walked to the rear of the store, and after they left, Lissauer handed \$1,300 in cash to the agents (Tr. 512-13).

Milton Weiner, a vice-president of Shield’s and Company testified regarding Jacobson’s 1969 account reflecting certain stock transactions with Weiner’s Company (Tr. 528-37).*

Ferdinand Menna testified regarding various acquisitions of Davos Stock for Jacobson, upon which the defendant earned capital gains in 1969, and 1973. (Tr. 546-613).*

Sidney Buchbinder, technical adviser for the Regional Counsel of the Internal Revenue Service, testified about figures he computed that served as a basis for the amounts in the indictment (Tr. 613-24).

* Both Weiner’s and Menna’s testimony also relate to only Count Two, on which Jacobson was found not guilty.

B. The Defense Case

A police officer, Andrew Kaczmarek, testified that on January 16, 1969, he responded to a call to Madame Lissauer's dress shop on Queens Boulevard, Queens, New York (Tr. 633-34). Once at the store Kaczmarek saw Ralph Jacobson standing inside with Theresa Lissauer, as Jacobson attempted to remove two dresses. Lissauer showed the officer her bankruptcy papers, after which the defendant told Kaczmarek that Lissauer owed him \$100 or \$150 for which he was going to take two dresses (Tr. 635-36).

Stanley Gewanter testified that as an attorney he represented Theresa Lissauer in her 1969 bankruptcy (Tr. 644). Lissauer supplied Gewanter with shopping bags full of papers and information pertaining to her creditors. Gewanter recalls that while listing the name Ralph Jacobson and the figure \$2,500 on the original bankruptcy petition, Lissauer indicated that she owed that sum to Jacobson from whom she had borrowed the money (Tr. 660).

Alphonse Esposito, warden of the Queens County Grand Jury, testified that having twice been present in Theresa Lissauer's store in 1969, he never saw the defendant there on those two days (Tr. 655-70).

Arlene Kohn testified that she was Theresa Lissauer's babysitter in 1969, and was present in the store when Lissauer had verbally ordered certain customers to leave (Tr. 673-74). Kohn had also been present when Lissauer threatened Trudy Tannenbaum (Tr. 675).

Rose Kohn explained that during 1968 and 1969 she helped at Mrs. Lissauer's store, and remembers that Lissauer went to the Mardi Gras one winter (Tr. 683-84). Mrs. Kohn also testified that although she had never heard Lissauer threaten anyone, Lissauer had taken money from

customers and without delivering the goods to them (Tr. 684).

Harry Spar, whose wife Gertrude was a customer of Lissauer's in 1968 and 1969, testified that on the four times in which he was in Lissauer's store in those years, he never saw Ralph Jacobson in the store (Tr. 687-88). Gertrude Spar also testified that during 1968 and 1969 she never saw Ralph Jacobson in Lissauer's store (Tr. 690-91).

Judith Rosenblum, Ralph Jacobson's niece, testified that in January 1968 she shopped in Lissauer's store with the defendant's wife (Tr. 693). The merchandise they purchased was damaged and it was never prepared to her satisfaction (Tr. 695-96).

Edgar Booth, an attorney, was a party to the Lissauer bankruptcy in 1969 (Tr. 705). Booth testified that Lissauer had sworn to the truth of the contents of her bankruptcy petition before the bankruptcy court (Tr. 707-08).

POINT I

The prosecution of this case was proper, and not violative of Jacobson's constitutional rights.

Jacobson variously contends that this prosecution was in violation of his constitutional rights under the Double Jeopardy Clause of the Fifth Amendment, and the related doctrine of Collateral Estoppel. For the first time, on appeal, he also contends that his prosecution was both violative of due process and "unfair," and that this Court should thus dismiss the indictment in the exercise of its supervisory powers over prosecutions within the District Courts of this Circuit. The substance of these arguments was presented to Judge Lasker, and rejected by him in a carefully considered memorandum opinion (App. 218). None of the arguments is meritorious, and Judge Lasker's disposition of them was entirely correct.

While suggesting throughout his brief that some vague notion of double jeopardy must result in the reversal of his conviction, Jacobson ultimately concedes that the legal concepts of that principle are "inadequate" to suit his purpose. (Appellant's Brief at 15-16). His concession is well justified, for the evidence required to prove the tax offense of which he stands convicted is plainly "not 'the same'" as that required to prove the extortion offenses of which he was acquitted in the Eastern District of New York. See *United States v. Alessi*, 536 F.2d 978, 981 (2d Cir. 1976). In the extortion case,

"The prosecution would not . . . have been required to establish that he failed to report his income. That allegation, the gravamen of the present indictment, did not constitute a 'piece of' any crime with which [Jacobson] was previously charged. Nor [had] he yet been placed 'in jeopardy' with respect to it."

United States v. Alessi, *supra*, 536 F.2d at 982. Indeed, while the crime of extortion is committed during the course of a given taxable year, the charged income tax violations occurred at a different point in time—on April 15 of the following year. See *United States v. Dawson*, 400 F.2d 194, 202 (2d Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969). Further, an extortionist may avoid criminal tax liability by reporting interest income on his tax return. See *United States v. Schipani*, 293 F.Supp. 156 (E.D.N.Y. 1968), *aff'd*, 414 F.2d 1262 (2d Cir. 1969), *cert. denied*, 397 U.S. 922 (1970). The charges in this indictment are simply different in law and in fact from those contained in the Eastern District indictment, *United States v. Papa*, 533 F.2d 815, 820 (2d Cir. 1976); *United States v. Cala*, 521 F.2d 605, 607 (2d Cir. 1975); *United States v. McCall*, 489 F.2d 359, 362 (2d Cir. 1973), *cert. denied*, 419 U.S. 849 (1974); *United States v. Pacelli*, 470 F.2d 67, 72 (2d Cir. 1972), *cert. denied*, 410 U.S.

983 (1973); *United States v. Edwards*, 366 F.2d 853, 872 (2d Cir. 1966), *cert. denied sub nom. Jakob v. United States*, 386 U.S. 908 (1967); *United States v. Kramer*, 289 F.2d 909, 913 (2d Cir. 1961). This is so, notwithstanding the fact that the evidence of *receipt* of the income—although not of Jacobson's perjurious tax return—was adduced at the prior trial. *United States v. Alessi*, *supra*, 536 F.2d at 982 (1957); *see United States v. Campisi*, 248 F.2d 102, 107 (2d Cir.), *cert. denied*, 355 U.S. 892 (1957). *See also United States v. Seijo*, 537 F.2d 694 (2d Cir. 1976).

Jacobson also complains that the doctrine of collateral estoppel requires reversal of his conviction, while also conceding, again with ample support in the case law, that this doctrine is "unworkable" in support of his contention (Appellant's Brief at 17). He does not even allege that he is able to shoulder "the weighty burden of establishing that the prior verdict *necessarily* determined in his favor the issue . . . sought to be foreclosed at the [instant] trial." *United States v. Seijo*, *supra*, 537 F.2d at 698 (emphasis in the original); *United States v. Cala*, 521 F.2d 605, 607-08 (2d Cir. 1975); *United States v. Gugliaro*, 501 F.2d 68, 70 (2d Cir. 1974). Indeed his failure to shoulder the burden required of him in order to sustain this defense is clearly established in the well-reasoned pre-trial opinion of Judge Lasker in the instant case, *United States v. Jacobson*, 404 F. Supp. 1238 (S.D.N.Y. 1975), an opinion with which Jacobson does not take issue before this Court. Indeed, Judge Lasker's conclusion that the Eastern District jury could well have found that Jacobson received the interest payments but did not use extortionate means to collect them—a necessary element of the offense—is eminently correct.

Finally, nothing in the instant prosecution even remotely resembles a violation of due process, or caused unfairness to Jacobson. Thus Jacobson's claim that this

Court should dismiss the indictment in the exercise of its supervisory powers is frivolous. Prior to the presentation of this case to the Grand Jury, this tax prosecution underwent a rigorous screening of its factual and legal bases by both the Office of the Regional Counsel of the Internal Revenue Service and the Tax Division of the United States Department of Justice. These time-consuming procedures, while effecting a delay in the ultimate institution of the present indictment, were clearly in the best interests of both Jacobson, and the general administration of the criminal justice system. *Compare, United States v. Robinson*, Dkt. No. 75- 1197 (2d Cir., April 8, 1976) slip op. 3119, 3137-38.*

It follows that Jacobson's assertions concerning the effect of the Eastern District acquittal are frivolous.

* Government files reflect that the Office of Regional Counsel transmitted the files, with its approval for prosecution, to Tax Division on November 11, 1974, and that Tax Division ultimately directed prosecution on March 3, 1975. The indictment was thereupon instituted on April 9, 1975.

Moreover, the Government deplores the misstatements contained in Jacobson's brief at 19-20, wherein it is alleged that Jacobson was "blindsided" to his detriment by the Government's failure to advise him of the impending tax prosecution at the time of the Eastern District trial. Jacobson fails to note, however, that he never once claimed before the District Court that he was misled by the Government. Had the District Court conducted an inquiry into the matter, it would have shown that Jacobson's attorney was specifically made aware of the then-pending tax investigation prior to Jacobson's Eastern District trial, during (unsuccessful) plea negotiations. While the Government does not contend that this fact should be accepted by this Court as determinative on this issue, we do make this offer of proof to underscore the significance of Jacobson's failure to allege a due process claim in the District Court.

POINT II

The District Court's charge was legally correct, and did not prejudice Jacobson.

Jacobson contends that the District Court's charge—directed specifically to Jacobson's ~~defense~~ on Count Two—may have caused the jury to convict him under an erroneous and inapplicable theory of law. His arguments, however, distort both the nature of the Government's evidence and the defense theory presented to the jury, and must fail.

Title 26, United States Code, Section 7206 (1) prescribes the wilful signing of an income tax return that the taxpayer "does not believe to be true and correct as to every material matter."

The Government's proof, as described above in the Statement of Facts, attributed to Jacobson wilfully unreported income in two consecutive years, 1968 and 1969. The unreported 1968 income (Count 1) consisted wholly of interest payments from a usurious loan to Theresa Lissauer. The 1969 income (Count 2) arose both from continued interest income from Lissauer and, principally, from a stock transaction from which the defendant had substantial unreported capital gain income. From the very outset of the trial, it became clear that the defense theory would be different as to each of these sources of income, and this divergence persisted throughout the entire course of the trial. Essentially, the defense contended that the Lissauer loans and repayments never occurred, whereas the stock transaction—while admitted—represented return of capital rather than income. (Tr. 596).

Defense counsel, for the first time on his summation, raised before the jury the possible defense to Count 2

that the \$3,000 in income that the Government attributed to Jacobson on the 1972 Davos stock deal introduced as a subsequent "similar act" may have been obscured on the return under the unexplained entry "Miscellaneous Income, \$6,933.33" (Tr. 779).^{*} Aside from the gross unlikelihood that a taxpayer might so act, foregoing the benefits of capital gains treatment of the income, a fact commented upon by the District Court below (Tr. 801), the Court expressed its concern that defense counsel was misleading the jury into thinking that a taxpayer who wilfully obscures the sources of his income, with the intention of misleading the Internal Revenue Service, was nonetheless free of culpability. (Tr. 798).

In clearing this confusion as to the charges contained in Count Two, the Court charged the jury as follows:

... If you find that Mr. Jacobson signed these returns in good faith and reasonably believed that their contents were true and complete, he has not committed a crime and he must be acquitted as to that return.

For in such a case, even if the return was not actually true or correct, he would be simply labor-

^{*}With regard to Count 1, as indicated above, the defense interposed was a complete denial that Jacobson had ever received interest income from Theresa Lissauer. (Tr. 750-62; 769-70; 773). However, with regard to the stock transaction income attributed to Jacobson during 1969, the defense was that the defendant—an uneducated "bagel baker" (Tr. 779)—who had been given unsound advice by an attorney, Ferdinand Menna, had in good faith thought that the capital gains income was merely a return of capital. (Tr. 781). To rebut this defense of lack of wilfulness, the Government offered into evidence, through the testimony of Menna, the fact that in 1972, he had given Jacobson \$3,000 as income from yet another sale of Davos stock. This income was not reported on his 1972 income tax return. (GX 5). It was in response to this "similar act" proof, as it bore on Jacobson's intent with respect to Count 2, that defense counsel suggested that this income was in fact reported in 1972 as "miscellaneous income."

ing under a mistake and would not be considered as having willfully and knowingly filed a false return.

For example—and this is an example that Mr. LaRossa raised yesterday, and I said something about it during his summation—as to the reporting of capital gains on the sale of the Davos stock, the Internal Revenue Code requires that such a gain must be reported on the tax return, and the regulations or the law require that the proper place to report a capital gain is on Schedule D of your tax return. However, even though the Internal Revenue Code says that a taxpayer must report a capital gain on Schedule D, nevertheless a taxpayer's failure to report it there would not constitute a false statement under the statute we are dealing with so long as you find that the income involved is reported elsewhere on the return, unless you find that when the defendant reported it elsewhere on his return he intended to defraud the government. (Tr. 814).

The Court's charge was a correct statement of applicable law, since it is well established that the gravamen of a 7206(1) violation is the intentional furnishing to the Government of false information, without regard to the tax consequences of the falsity. *United States v. Beasley*, 519 F.2d 233 (5th Cir. 1975); *United States v. DiVarco*, 484 F.2d 670 (7th Cir. 1973), *cert. denied*, 415 U.S. 916 (1974); *Jaben v. United States*, 349 F.2d 913 (8th Cir. 1965); *Siravo v. United States*, 377 F.2d 469 (1st Cir. 1967); *cf. Edwards v. United States*, 375 F.2d 862 (9th Cir. 1967); *United States v. Tadio*, 223 F.2d 759 (2d Cir.), *cert. denied*, 350 U.S. 874 (1955). Indeed, it is the attempted evasion of a tax—the tax consequences—that separates the violator of Section 7206(1) from the more serious violator of Section 7201. *United States v. Beasley*, *supra*. Thus, the intentional

misstatement of the source of one's income, even where the amount is not understated, will constitute a violation of Section 7206(1). *United States v. DiVarco, supra.*

Furthermore, it is clear beyond peradventure that Jacobson was not prejudiced by this portion of the Court's charge. First, defense counsel's summation and the initial charge itself—adverted solely to Count Two, to which that defense was directed and on which Jacobson was acquitted. Second, an analysis of the evidence, viewed in the light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60 (1942), makes it plain that the jury could not have convicted Jacobson under the theory hypothesized in his brief at page 28, *i.e.*, that he had fraudulently reported the Lissauer interest income within the \$3,440 reported as miscellaneous income.*

Lissauer testified that she had on two occasions during 1968 obtained interest-bearing loans from Jacobson.** During the second or third week of January, she borrowed \$1,500, and again, in April she borrowed an additional \$1300. Following the first loan, she made eight or nine weekly payments of \$150 each, after which she was advised during a confrontation with Jacobson that "all you have been paying has been the vigorish [*i.e.*, interest]. I'll let you know when you come to the principal." Never advised by Jacobson that she had reduced the principal, and prodded by several threats, she continued to make the \$150 payments, until the time of the second loan in April, at which time Jacobson demanded that the payments be increased to \$200 weekly. She

* It is interesting to note, of course, that Jacobson introduced no evidence showing that the "miscellaneous income" related to the interest payments, nor did his attorney ever claim this in summation.

** Additionally, she had on a third occasion borrowed \$425 to meet a rental payment, but this was repaid the following day without interest. (Tr. 181).

continued making payments, each week, of never less than \$150 until the end of March, 1969 when her business failed and she went into hiding. Simple computations, using this minimum figure of \$150 per week, yield payments to Jacobson totalling \$9,300. Of this sum, \$7,350 was paid during 1968.* The jury could thus infer from this sequence of events only that *all* of the money paid to Jacobson was interest, and any suggestion that the jury could have found that the 1968 payments were subsumed within the \$3,440 reported as miscellaneous income can only be characterized as frivolous.

In sum, Judge Lasker's charge properly reflected the law, and in any event could have had no effect on the verdict on Count One.

CONCLUSION

The judgment of conviction should be affirmed.

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* Furthermore, on one specific occasion during the summer or early fall of 1968, Jacobson took dresses from her store valued at some \$500 (Tr. 203-04), and on another vivid occasion during the summer of 1968, Jacobson took, as "collateral" a mink coat valued at \$3,000. She never saw any of this clothing again.

AFFIDAVIT OF MAILING

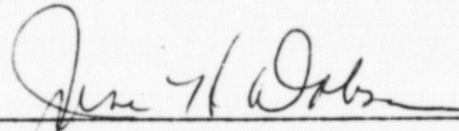
STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

June H. Dobson being duly sworn, deposes and says that she is employed in the office of the Strike Force for the Southern District of New York.

That on the 18th day of October, 1976 she served two copies of the within Brief by placing the same in a properly postpaid franked envelope addressed:

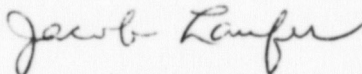
Gerald Shargel, Esquire
La Rossa, Shargel & Fischetti
522 Fifth Avenue
New York, N.Y. 10036

And deponent further says that she sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.


June H. Dobson

Sworn to before me this

18th day of October, 1976



JACOB LANGER

Judge, District Court, Southern District of New York

County of New York

Subscribed and sworn to before me on the 18th day of October, 1976